

JAN 26 1984

ALEXANDER L. STEVAS,

CLERK

No. 83-185

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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SYLVIA COOPER, ET AL.,  
*Petitioners,*

v.

FEDERAL RESERVE BANK OF RICHMOND,  
*Respondent.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN SUPPORT OF RESPONDENT**

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ROBERT E. WILLIAMS  
DOUGLAS S. McDOWELL  
STEPHEN C. YOHAY \*  
McGUINNESS & WILLIAMS  
1015 15th Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600

*Attorneys for Amicus Curiae  
Equal Employment  
Advisory Council*  
\* Counsel of Record

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**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN SUPPORT OF RESPONDENT**

---

This brief of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of all parties, and in support of the Respondent, Federal Reserve Bank of Richmond. The consents of the parties have been filed with the Clerk of the Court.

**INTEREST OF THE AMICUS CURIAE**

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment

of the employer community in the United States, including both individual employers and trade and industry associations. The Council is governed by a board of directors which is composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. The members of the Equal Employment Advisory Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e., whether members of a properly certified class, having elected upon notice to remain in the class, are barred by *res judicata* from relitigating individual claims of discrimination following an adverse determination on the class claim of discrimination.

Because of its interest in such issues, EEAC has participated in numerous cases in this Court raising substantive and procedural issues related to litigation of equal employment opportunity claims. *See, e.g., Crown, Cork & Seal Co., Inc. v. Parker*, 103 S.Ct. 2392 (1983); *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057 (1982); *General Telephone Co. of the Southwest v. Falcon*, 102 S.Ct. 2364 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438

U.S. 567 (1978); *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

### STATEMENT OF THE CASE

On March 22, 1977, the Equal Employment Opportunity Commission ("EEOC") filed an action against the Federal Reserve Bank of Richmond ("the Bank"), alleging, *inter alia*, that the Bank had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981, by failing to promote blacks because of race (JA. 6a).<sup>1</sup> On September 26, 1977, three former bank employees<sup>2</sup> and one present employee<sup>3</sup> ("the Cooper plaintiffs") filed a complaint in intervention in the EEOC action alleging, *inter alia*, that the bank had discriminated against each on account of race with regard to promotions, wages and job assignments (JA. 12a). The complaint in intervention also alleged a class action pursuant to Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure (hereinafter "FRCP").

On April 26, 1978, the district court entered a Consent Order reciting several agreements reached by the parties. (JA. 24a). First, the parties agreed upon a designation of the class to include all black persons who worked for the Bank at its Charlotte, North Carolina office at any time since January 3, 1974. The parties further agreed that while the complaint had alleged racial and sex discrimination in numerous

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<sup>1</sup> "JA" references are to the Joint Appendix. "A" references are to the Appendix prepared by the petitioners.

<sup>2</sup> Sylvia Cooper, Constance Russel, Helen Moore.

<sup>3</sup> Elmore Hannah, Jr.

types of employment practices, the complaint stated claims "only as to the *promotion* of blacks in general and the denial of promotions and the constructive discharge of one individual, Sylvia Cooper, on account of her race and sex." (JA. 26-27a) (Emphasis added).

The Consent Order also certified the plaintiffs as class representatives under FRCP Rule 23(b)(2) and (3).<sup>4</sup> In certifying the class the district court found that "class representation by the plaintiff-intervenors is superior to other available methods for the fair and efficient adjudication of the controversy." (JA. 29a).

The Consent Order further required the plaintiffs to publish a notice of the class action, and to mail the notice to each member of the class. The notice recited that the class representatives had alleged discrimination by the Bank against blacks "in promotions, wages, assignments and other terms and conditions of employment." (JA. 34a). The notice also advised class members, *inter alia*:

4. If you fit in the definition of the class in paragraph 3 you are a class member. As a class member, you are entitled to pursue in this action any claim of racial discrimination in employment you may have against the defendant. You need do nothing further at this time to remain a member of the class. However, if you so desire, you may exclude yourself from the class by notifying the Clerk, United States District Court, as provided in paragraph 6 below.

5. If you decide to remain in this action, you should be advised that: the court will include

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<sup>4</sup> The complaint in intervention sought certification only of a (b)(2) class action. The significance of the additional certification of the class under Rule 23(b)(3) is discussed *infra*.

you in the class in this action unless you request to be excluded from the class in writing; *the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action; and if you do not request exclusion, you may appear at the hearings and trial of this action through the attorney of your choice.* (J.A. 35a-36a) (Emphasis added).

On October 30, 1980, following the liability stage of the trial,<sup>5</sup> the district court found that plaintiff-intervenors Cooper and Russell had been denied promotions on racial grounds, but that plaintiff-intervenors Moore and Hannah had proven no discrimination. As to the class, the court stated in a Memorandum of Decision:

The court finds that defendant engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to afford black employees opportunities for advancement and assignment equal to opportunities afforded white employees in pay grades 4 and 5.<sup>6</sup> Defendant has not submitted statistical evidence rebutting plaintiff-intervenors' case with respect to discrimination in those grades. Other than in the above particulars, however, there does not appear to be a pattern and practice of discrimina-

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<sup>5</sup> The trial was bifurcated under the procedure sanctioned in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359-62 (1977).

<sup>6</sup> On appeal, the Fourth Circuit reversed this finding on the merits, and found no class-wide discrimination at any pay grade.

tion pervasive enough for the court to order relief. (A. 193a-194a).

On March 23, 1981, counsel for the class filed a motion on behalf of petitioners Phyllis Baxter and five other class members to intervene in the class action ("petitioners" or "the *Baxter* plaintiffs"). (JA. 46a). The *Baxter* complaint in intervention alleged, *inter alia*:

Intervenors were employed by defendant at its Charlotte Branch and were subjected to discriminatory employment practices by the Bank pursuant to *the same policies and practices as alleged in the original complaint*. (JA. 47a) (Emphasis added).

The complaint in intervention alleged that each intervenor had been denied promotions because of race and color. Four of the plaintiffs alleged that they had sought promotions at pay grades above grade 5. The other two sought positions at grade 5 or below. The complaint alleged no discriminatory employment actions other than promotions, nor any grounds of discrimination other than race and color.

Each of the *Baxter* plaintiffs had received the notice sent to the *Cooper* class, and had elected not to opt out of the class. Indeed, the *Baxter* plaintiffs each testified at the trial of the *EEOC* and *Cooper* action about various individual claims of discrimination. However, as the Fourth Circuit explained,

specific evidence of individual acts of discrimination in promotion was [deemed] relevant [by the district court], but, under the practice in a bifurcated trial, it was not admitted to establish the class members' right to relief, but to provide

support for the *prima facie* class claim of liability.

698 F.2d at 674-75.

On May 29, 1981, the district court issued its findings of fact and conclusions of law. (A. 197a, 256a). The court found that black employees in the Bank's pay grades 4 and 5 had been subjected to racial discrimination in promotions. As to pay grades above grade 5, however, the district court articulated the following, specific conclusion:

27. The Court concludes that there was *no showing* that the bank had discriminated against black employees with respect to *promotions* out of grades 6 and above, and that defendant did not violate Title VII or 42 U.S.C. § 1981 with respect to promotions out of grade 6 and above. (A. 284a-285a) (Emphasis added).

On the basis of these conclusions, the court denied the *Baxter* plaintiffs' motion to intervene in the class action. The court reasoned that the *Baxter* plaintiffs in pay grade 5 or below were members of the certified class as to which discrimination had been found, rendering intervention unnecessary. The court reasoned that as to the *Baxter* plaintiffs in pay grades *above* grade 5, "[t]he court has found *no proof* of any class-wide discrimination above grade 5 and, therefore, [the *Baxter* plaintiffs] are not entitled to participate in any Stage II proceedings in this case." (A. 287a).

In its Order denying intervention, the court additionally stated:

The pendency of this action has apparently tolled the rights of the would be intervenors to file separate individual actions preceded by claims filed with the EEOC as to Title VII

rights, and it has also apparently tolled their rights to file suit under 42 U.S.C. § 1981.

I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week. \* \* \* \* (A. 287a-288a).<sup>7</sup>

Having been denied intervention in the class action, the *Baxter* plaintiffs commenced a new action under 42 U.S.C. § 1981,<sup>8</sup> alleging again in their complaint that they had been denied promotions by the Bank at its Charlotte Branch on account of their race. (JA. 63a). This new complaint omitted the allegation contained in their earlier *Baxter* complaint in intervention, i.e., that they had suffered discrimination as a result of "the same policies and practices" as alleged in the original class complaint. However, the allegations as to the discrimination in promotions suffered by the individual *Baxter* plaintiffs remained unchanged from the allegations in their complaint in intervention. Once again, the only employment action complained of was discrimination in promotions on account of race. (JA. 63a-70a).

On February 26, 1982, the district court denied the Bank's motion to dismiss the *Baxter* complaint, but entered the findings necessary to permit the Bank to take an interlocutory appeal of its decision pursuant to 28 U.S.C. § 1292(a). (A. 290a). This appeal was consolidated with the Bank's appeal from the adverse portion of the district court's decision on the merits in the *Cooper* action.

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<sup>7</sup> The import of this statement is discussed below, p. 27, *infra*.

<sup>8</sup> The *Baxter* complaint does not allege violations of Title VII.

On appeal, the Fourth Circuit reversed the district court's finding that the Bank had discriminated against blacks in promotions in grades 4 and 5.<sup>9</sup> The Fourth Circuit also reversed the district court's decision denying the Bank's motion to dismiss the *Baxter* plaintiffs' complaint. The Fourth Circuit applied the rule that absent due process violations, class members are precluded by the doctrine of *res judicata* from seeking relief individually on charges of discrimination which were decided against them in the class action. Finding no due process infirmities in the class certification, notice or adequacy of representation, the Court of Appeals held that:

The class certified and the charges litigated in the class action included the claims and charges asserted by the plaintiffs in these subsequent individual suits. They . . . are, therefore precluded by the determination of the District Court in the class action that there was no practice of discrimination in promotion out of pay grades above pay grade 5 in the years 1974 forward.

698 F.2d at 674.

This Court granted *certiorari* to consider whether the Fourth Circuit correctly applied the doctrine of *res judicata* to preclude petitioners from maintaining their separate cause of action.

### SUMMARY OF ARGUMENT

A. Under the doctrine of *res judicata*, a final judgment on the merits precludes a party from relitigating that which was or could have been litigated in that

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<sup>9</sup> EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983). The plaintiffs did not appeal the district court's finding of no discrimination in all pay grades above pay grade 5. 698 F.2d at 638.

action. In this case, the parties agreed that the only issue which the *Cooper* class would litigate would be whether the Bank had discriminated against blacks with respect to promotions at its Charlotte, North Carolina branch. Following a Stage I trial using the bifurcated trial mechanism, the trial court found discrimination at some pay grades, and none at others. On appeal, the Fourth Circuit reversed the finding of discrimination, so that ultimately no pattern and practice of discrimination at any grade was found.

Petitioners would now maintain an action alleging the exact form of discrimination found absent in the class action, i.e., discrimination in promotions. Absent due process concerns, these claims are barred by the doctrine of *res judicata*.

The petitioners' due process rights were protected by the district court's application of Rule 23 of the Federal Rules of Civil Procedure. This is especially so since the district court certified the class with the parties' consent pursuant to Rule 23(b)(3). Under that subdivision, the court was required to give special attention to whether the instant controversy could best be resolved by a class action or individual ones. Thus, application of Rule 23(b)(3) assured that the petitioners' individual rights were given due consideration.

The district court also ordered that each class member be sent notice of the right to remain in the class or opt out. The petitioners each received notice and decided to remain in the class. The notice procedure further protected the due process rights of the petitioners. In sum, there is no bar to the application of the *res judicata* doctrine here.

B. To allow petitioners to maintain an individual action following litigation of the class action would be

to permit precisely the kind of "one-way" intervention which Rule 23 was intended to avoid. Thus, it would be as if the district court had deferred deciding the question of class certification, and determined after the trial that certification should have been denied early in the action. In either event, the resources of all concerned would have been wasted, while the plaintiffs remain unbound by the judgment in the class action.

In accord with the objectives of Rule 23, the district court certified the class early in the action, and narrowed the class issues for litigation, all with the parties' consent. To hold that the class members are not bound by the adverse class judgment would be to undermine the district court's efforts properly to manage the class. Such a result would also undercut the purposes of the notice which the district court ordered be sent to all class members pursuant to Rule 23(c). To reaffirm its prior decisions recognizing the importance of notice in class actions, particularly as to classes certified under Rule 23(b)(3), the Court should not allow petitioners to avoid the consequence of the election they made upon receiving the 23(c) notice. Rather, the petitioners should be bound by their election.

C. The government contends that the rights of individual class members cannot be decided adversely at Stage I of a bifurcated trial. This argument, however, misconceives the purpose of the bifurcated trial mechanism in class action litigation of employment discrimination claims. The purpose of the device is merely to afford an individual plaintiff a means other than an individual lawsuit by which to satisfy his personal burden of establishing a *prima facie* case. A

plaintiff's election to remain part of a class to present evidence of asserted classwide discrimination does not alter the fact that the burden of establishing a *prima facie* case must be satisfied for his individual claim to survive. Therefore, if the class fails to prove a *prima facie* case by failing to establish a pattern and practice of discrimination, the result for each class member is no different than if the individual had failed to prove a *prima facie* case in an individual action, i.e., his complaint is subject to dismissal.

The petitioners are incorrect in asserting that they were prejudiced by the trial court's post-trial comment to the effect that petitioners were yet free to maintain individual actions under Title VII or 42 U.S.C. § 1981. The time to elect whether to remain in the class or maintain an individual suit had passed four years earlier upon each petitioner's receipt of the class action notice. The trial court's comments years later could not resurrect an option for the petitioners which had long since expired by operation of Rule 23(c).

## ARGUMENT

### I. THE FOURTH CIRCUIT PROPERLY DETERMINED THAT THE PETITIONERS' CLAIMS OF DISCRIMINATION IN PROMOTIONS ARE BARRED BY THE JUDGMENT IN THE *COOPER* CLASS ACTION.

As a general matter, subsequent efforts by members of a class to litigate claims that were or might have been brought in the original class action are barred by the doctrine of *res judicata*. Cf., *Migra v. Warren City School District Board of Education*, 52 U.S.L.W. 4151 (U.S. January 23, 1984); 7A Wright & Miller, *Federal Practice and Procedure* § 1789 (1972). Before the bar of *res judicata* may be applied to the claim of an absent class member, however, it must be

shown that invocation of the bar is consistent with due process. *E.g., Hansberry v. Lee*, 311 U.S. 32 (1942).

We show below that the claims which petitioners would assert in their individual action are precisely those which were decided against the *Cooper* class on the merits below. We also show that the due process rights of the petitioners were protected by the operation of FRCP Rule 23, governing class actions.

***A. The Fourth Circuit Properly Applied the Doctrine of Res Judicata to Bar Relitigation of the Issues Decided Against the Cooper Class.***

"For a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases." *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir. 1979); *Stevenson v. International Paper Co.*, 516 F.2d 103, 108 (5th Cir. 1975). Here, the petitioners assert that their claims of individual discrimination are to be distinguished from the class claims of discrimination, notwithstanding that both allege discrimination by the Bank at its Charlotte branch in promotion of blacks. Thus, the last portion of the test set forth above is in issue.

"Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 n.6 (1982).<sup>10</sup> *Migra v.*

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<sup>10</sup> As this Court noted in *Kremer*, "invocation of *res judicata* and collateral estoppel 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudica-

*Warren City School District Board of Education, supra.* Application of this test is not difficult where, as here, the *Baxter* complaint in intervention alleged that the plaintiffs

were subjected to discriminatory employment practices by the Bank pursuant to *the same policies and practices as alleged in the original [Cooper] complaint.* (JA. 47a).

The remainder of the complaint in intervention in *Cooper*, and the subsequent complaint initiating the separate action now before this Court, allege that these "policies and practices" were racial discrimination in promotions.

The original *Cooper* complaint alleged a broad variety of discriminatory employment actions. However, the *Cooper* class ultimately stipulated that its complaint stated a cause of action only as to promotions, and the district court's consent order so stated. The district court found a pattern and practice of discrimination in promotions in pay grades 4 and 5. The Court of Appeals reversed that finding on its merits, however, and *certiorari* has not been granted to review that reversal. The law of this case, therefore, is that the Bank did not discriminate in promotions in grades 4 and 5.

As to promotions in grades above grade 5, the district court found no discrimination. When it first articulated its finding on this point, the district court spoke imprecisely, stating in a Memorandum of Decision that in those pay grades, "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief."

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tion.'" 456 U.S. at 467 n. 6, quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980). *Accord*, *Kemp v. Birmingham News Co.*, *supra*, 608 F.2d at 1052.

*Supra*, pp. 5-6. Petitioners argue that this language implies that *some* individual discrimination was perceived by the district court, albeit insufficient to constitute a pattern and practice warranting classwide remedial relief.

The district court's final judgment with respect to promotions in grades above grade 5, however, is unequivocal and precise. Thus, in its finding number 27, the district court found "that there was no showing that the bank had discriminated against black employees with respect to promotions out of grade 5 and above . . . ." *Supra*, p. 7.<sup>11</sup> The district court repeated this finding in denying the *Baxter* plaintiffs' post-trial motion for intervention, stating that "[t]he court has found no proof of any classwide discrimination above grade 5 . . . ." *Supra*, p. 7.

In sum, the allegations in the *Baxter* complaint in intervention make clear that petitioners would relitigate the exact claim decided against the *Cooper* class, i.e., the Bank's promotion practices at its Charlotte branch.<sup>12</sup> Accordingly, absent a violation of due process, the petitioners are barred by the doctrine of *res*

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<sup>11</sup> The brief of Respondent Bank makes clear that while the district court adopted virtually all of the proposed findings of fact and conclusions of law proposed by the *Cooper* plaintiffs, finding number 27 was not proposed. Rather, it was written by the district court, apparently reflecting the court's deliberate judgment on this point.

<sup>12</sup> Because the *Cooper* class was certified under Rule 23 (b) (2) and (3), the class had the opportunity to seek injunctive, declaratory and monetary relief. Thus, no new action is needed to allow plaintiffs to seek relief which they could not have sought earlier. See *Johnson v. General Motors Corp.*, 598 F.2d 432, 437-38 (5th Cir. 1979).

*judicata* from maintaining individual actions to relitigate those claims. *Hansberry v. Lee*, *supra*.

***B. The Petitioners' Due Process Rights Were Protected by the District Court's Application of the Criteria of Rule 23.***

The petitioners contend that they were deprived of their right to maintain an individual action by the manner in which the district court managed the class action. We submit, however, that the district court's application of Rule 23, particularly subdivision (b) (3), protected the due process rights of the petitioners.

As noted above, while the *Cooper* class sought certification only under FRCP 23(b)(2), the district court also certified the class under 23(b)(3) with the parties' consent. This fact alone rebuts petitioners' claim that their right to bring individual actions was abridged.

As described in the Advisory Committee notes to the 1966 amendments to Rule 23, the purpose of the Rule is to distinguish between those controversies best resolved by individual lawsuits, and those "in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness to bringing about other undesirable results." Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102-03. To this end, a district court certifying a (b)(3) class is required to find that the class action procedure is "superior" to other means of resolving the controversy in the circumstances. The Advisory Committee notes state that the following considerations are germane to this determination:

The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the actions through representatives would be quite unobjectionable \* \* \* \* The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered.

39 F.R.D. at 104. The Advisory Committee contemplated that evaluation of these issues would be made exactly as it was in this case, i.e., "with the aid of the parties." 39 F.R.D. at 103. Thus, in determining with the parties' consent that the controversy would best be decided by a class action, the district court necessarily considered "the interests of individual members in controlling their own litigations and carrying them on as they see fit." *Id.* at 104. *Accord, Taylor v. Union Carbide Corp.*, 93 F.R.D. 1, 9 (S.D. W.Va. 1980). Thus, the application of Rule 23(b) (3) by the court protected the class members' individual rights, for it required the court carefully to evaluate whether this controversy could best be resolved by a class action as opposed to individual lawsuits.

***C. The Notice Sent to the Cooper Class, Affording Petitioners the Chance to Opt Out, Further Protected Petitioners' Rights.***

Rule 23(c) (2) was intended to protect the right of individual (b) (3) class members to choose whether to remain in a class, or to opt out. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 154, 173 (1974). This Court

has described the operation and purpose of the notice provisions of Rule 23(c) as follows:

Once it is determined that the action may be maintained as a class action under subdivision (b) (3), the court is mandated to direct to members of the class 'the best notice practicable under the circumstances' advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not if they do not request exclusion, and that a member who does not request exclusion may enter an appearance in the case. Rule 23(c) (2). Finally, the present Rule provides that in Rule 23(b) (3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion. Rule 23(c) (3). Thus, *potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action* when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

*American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 548-49 (1974) (footnotes omitted) (emphasis added) (hereinafter cited as "*American Pipe*").

In the instant case, the petitioners each received the notice described in the Statement of the Case, advising that they could remain members of the class,

or opt out. Petitioners also were advised by the notice that if they remained in the class, they would be bound by the eventual class judgment. Petitioners elected to remain in the class, and participated in the trial. Plainly, the notice procedure protected each petitioner's right to pursue an individual action rather than class relief.

In sum, it is clear that petitioners' due process rights were protected by the district court's application of Rule 23. It was proper, therefore, for the Fourth Circuit to bar petitioners on the grounds of *res judicata*, from maintaining a separate action.

## **II. TO PERMIT PETITIONERS TO MAINTAIN A SEPARATE ACTION WOULD FRUSTRATE THE PURPOSES OF RULE 23.**

### ***A. The Result Petitioners Seek Would Result in a "One-way" Class Action.***

An important purpose of the 1966 amendments to Rule 23 was to end the "spurious" or "one-way" class action, in which class members were permitted to intervene after a judgment on the merits favorable to their interests, while remaining unaffected by a judgment contrary to their position. As the Advisory Committee on the amendments noted:

Under proposed subdivision (c) (3), one-way intervention is excluded, the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

39 F.R.D. at 106.

To this end, Rule 23 is designed to encourage the district court to determine whether to certify a class

"as soon as practicable after the commencement of the action . . . ." *American Pipe, supra*, 414 U.S. at 548-49. In some cases, as, for example, where it is difficult to tell whether the claims of the asserted class representatives are typical of the claims of the putative class, deferral of a decision on class certification may be appropriate. It has been recognized, however, that even when deferral is proper, unfairness sometimes results. First, "[a] negative determination following trial reveals in retrospect an apparent waste of judicial and party resources, but the waste is real only if it be assumed that an earlier determination was possible." *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 275 n.11 (4th Cir. 1980). Second, though a deferred decision not to certify the class finally favors the party opposing class certification, deferring it has been unfair to the extent it allows, in effect, one-way intervention by class members. *Id.*

Where it is unclear whether a class should be certified early in an action, lower courts have struggled to avoid such unfair results. See, e.g., *Stastny v. Southern Bell Telephone & Telegraph Co.*, *supra*, *Huff v. N.D. Cass Co. of Alabama*, 485 F.2d 710 (5th Cir. 1973). In the instant case, however, the district court was able to determine early in the action with the parties' consent that certification of a class on a single, narrow issue was appropriate. In this circumstance, a holding which would amount to deferred denial of certification would result in a "real" waste of resources. *Stastny v. Southern Bell Telephone & Telegraph Co.*, *supra*.

This is precisely what would result, however, if petitioners are permitted to bring an individual action. The effect would be no different than if certifi-

cation of the class had been deferred, and ultimately denied, following the trial on the merits. Thus, the Bank and the courts below would have invested their resources in lengthy class action litigation, while the class members remain unbound by the judgment. See *Crown, Cork & Seal Co., Inc. v. Parker*, 103 S.Ct. 2392, 2395-96 (1983). The district court's efforts to achieve early certification in accord with Rule 23 would be undermined. In sum, the petitioners would have had the benefit of a one-way class action, which is exactly what Rule 23 is intended to avoid. Moreover, "the efficiency and economy of litigation which is a principal purpose of the [Rule 23] procedure" would have been defeated. *American Pipe, supra*, 414 U.S. at 553.

***B. To Allow Petitioners to Maintain an Individual Action Would Frustrate the Purpose of the Notice Provisions of Rule 23***

In *Eisen v. Carlisle & Jacquelin, supra*, this Court went to great lengths to assure that members of a (b) (3) class receive proper notice of their right to remain in or opt out of a class. As noted above, the Court deemed this notice essential to protection of the class members' due process rights. See *Crown, Cork & Seal Co., Inc., v. Parker, supra*, 103 S.Ct. at 2396.

At the same time, however, the notice procedure has other important purposes. It serves to identify the class members, and to ascertain which members will be bound by the judgment. *Id.* at 2397. See also *Johnson v. General Motors Corp., supra*, 598 F.2d at 437-38.<sup>13</sup> It also allows the parties and the court to

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<sup>13</sup> It has also been recognized that the notice provisions of Rule 23(c) help promote settlements of class actions, in that

assess the magnitude of the action, and to calculate and allocate the resources required to deal with the action accordingly. Obviously, the court's management of the class action is improved significantly by having such information as early in the action as possible.

In this case, the sufficiency of the notice sent to the class is unchallenged, and it is undisputed that the petitioners each received the notice and decided not to opt out of the class. As the Court made clear in *American Pipe, supra*, the potential class members "retain the option" to withdraw from or participate in the class action "*only* until . . . they are sent notice . . . ." 414 U.S. at 548-49. (Emphasis added). In these circumstances, to allow petitioners to maintain an individual action, and thus avoid the consequences of the election they made upon notice, would be to frustrate the Rule 23 notice mechanism. For these reasons, the Court in this case should reinforce the emphasis it has placed on the importance of notice in Rule 23(b)(3) class actions, and hold that the petitioners are bound by the election they made when they declined the opportunity to opt out of the *Cooper* class. *Eisen v. Carlisle & Jacquelin, supra*; *American Pipe, supra*. See *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 411-12 (2d Cir. 1975).

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a defendant who desires to settle a class action can be assured following the notice procedure that any settlement will bind those who have elected to remain in the class. *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Kemp v. Birmingham News Co., supra*, 608 F.2d at 1053-54.

### III. A JUDGMENT ON THE MERITS ADVERSE TO THE CLASS AT STAGE I OF A BIFURCATED TRIAL PRECLUDES SUBSEQUENT INDIVIDUAL ACTIONS BY CLASS MEMBERS.

The United States and Equal Employment Opportunity Commission (EEOC), as amici, contend that the adverse judgment in the *Cooper* class action could not possibly have determined the petitioners' individual claims, because the trial was limited to the issue of classwide liability pursuant to the bifurcated trial procedure sanctioned by the Court in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) (hereinafter cited as "*Franks*"). Brief for United States and EEOC at 14-16. We have already demonstrated that in this particular case, the claims which petitioners would press were presented to and decided by the courts below. We now address the government's broader argument, i.e., that the claims of individual plaintiffs inherently are not finally decided when Stage I of a bicurcated trial yields a judgment on the merits adverse to the class.

Stated simply, the government's contention misperceives the nature of the bifurcated trial mechanism created by the Court. In *Franks*, the class representatives proved that the employer had engaged in a pattern and practice of discrimination in violation of Title VII. Despite this showing, the trial court placed the burden of proving discrimination against individual class members upon the plaintiffs. The Court found error in this allocation of the burden of proof, concluding that by proving a pattern and practice of discrimination against the class, the "plaintiffs had made out a *prima facie* case of discrimination against the individual class members." *International Brotherhood of Teamsters v. United States*, 431 U.S. 357, 359 (1977) (hereinafter cited as

"*Teamsters*") (emphasis added). The court held that the burden had thus been shifted to the employer to prove that the individual members of the class had not been victims of the proven pattern and practice. *Id.*

In explaining its *Franks* ruling, the Court in *Teamsters* made clear the purpose of the bifurcated trial mechanism. As background, the Court recounted that in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), it had "considered 'the order and allocation of burden of proof in a private, non-class action challenging employment discrimination.'" *Teamsters*, *supra*, 431 U.S. at 357. Thus, in *McDonnell Douglas*, the court held that "an individual Title VII plaintiff must carry the initial burden of proof by establishing a *prima facie* case of racial discrimination." *Id.* This initial showing creates the inference that the employment action of which the minority plaintiff complains was due to discrimination prohibited by Title VII, and shifts the burden to the employer to "rebut that inference by offering some legitimate, nondiscriminatory reason" for the employment action. *Id.* at 358.

In *Franks*, it was argued that the *McDonnell Douglas* pattern was the only way to show a *prima facie* case of individual discrimination. The Court made clear, however, that such is not the case. Thus, the Court in *Franks* permitted an individual plaintiff to join with other members of a class to demonstrate a pattern and practice of prohibited discrimination, and held that when a class of plaintiffs makes such a showing, it has "made out a *prima facie* case of discrimination against individual class members." *Id.* at 359. Once this showing is made, the burden shifts to the employer to rebut the resulting infer-

ence of discrimination. If this inference is not rebutted, the Court may find for the plaintiff class in the Stage I liability phase and proceed to Stage II to determine appropriate remedies. In Stage II, the defendant has the opportunity to demonstrate that individual employment decisions were not the result of the proven, discriminatory pattern and practice.

The significant point which this Court emphasized in *Teamsters* is that the bifurcated trial mechanism created in *Franks* is nothing but an alternative to the *McDonnell Douglas* pattern for the individual Title VII plaintiff's proof of a *prima facie* case. As the Court stated in *Teamsters*, "[t]he *Franks* case thus illustrates another means by which a Title VII plaintiff's initial burden of proof can be met." *Id.* at 359. In other words, a Title VII plaintiff may choose between two methods of establishing his *prima facie* case. He may bring an individual action, and attempt to sustain the *McDonnell Douglas* burden by himself. Alternatively, he may become part of a class, and utilize the economies of the class action to satisfy his personal burden of proving a *prima facie* case if the class proves a pattern and practice of discrimination. As this Court stated in *Teamsters*:

The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on discriminatory criterion illegal under the Act.

In *Franks* . . . . the Court applied this principle in the context of a class action.

Thus, under *Franks*, a Title VII plaintiff may use the class action device to sustain his own burden of proof. However, that the plaintiff may opt to prove his *prima facie* case by means of the kind of evidence which a class would present, i.e., pattern and practice evidence, does not alter the basic fact that the burden of establishing a *prima facie* case must be satisfied for his individual claim to survive. Stated otherwise, the burden which the class must sustain is nothing more than the aggregate of the burdens of the respective class members. As has been recognized, "Rule 23, as amended, contains nothing to indicate that it has now become something more than a procedural device to permit several plaintiffs to unite in a single suit." *Snyder v. Harris*, 268 F. Supp. 701, 704 (E.D. Mo.), *aff'd*, 390 F.2d 204 (8th Cir. 1968).

Thus, if a class fails to establish a *prima facie* case of discrimination because it can show no pattern and practice of discrimination, the result is no different for the individual class members than if each had brought an individual action, and failed to establish a *prima facie* case under *McDonnell Douglas*.<sup>14</sup> In the instant case, the petitioners decided that the class action presented a desirable alternative to bringing individual actions, and they elected upon notice to re-

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<sup>14</sup> "The Court as well as the parties must be mindful that, should [a] proposed class be certified, the individual rights of the class members will be affected whether the named plaintiffs win or lose on the merits." *Taylor v. Union Carbide Corp.*, *supra* 93 F.R.D. at 3. As Judge Gobold of the Fifth Circuit once noted, "counsel, and at times the courts, [move] . . . blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy." *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1127 (5th Cir. 1969) (Gobold, J., specially concurring).

main in the *Cooper* class. The *Cooper* class failed to establish a pattern and practice of discrimination at any pay grade, i.e., it did not make a *prima facie* showing of discrimination. The plaintiffs individually are bound by this result. Having each failed to make a *prima facie* showing of discrimination because their class established no pattern and practice, the individual petitioners' complaints are subject to dismissal, just as they would be if each plaintiff had failed to prove a *prima facie* case under *McDonnell Douglas*.

The ultimate point is that the government is simply wrong in its contention that individual claims of discrimination cannot be finally adjudicated in Stage I of a bifurcated class action under *Franks*. Where the plaintiff class satisfies its burden of proving a *prima facie* case, then the question whether individuals are entitled to relief is left for Stage II, where the individual plaintiffs enjoy the benefit of the presumption of discrimination flowing from the success of the class in Stage I. Where the class fails to make out a *prima facie* case, however, the individual class members are properly bound by that result, and the judgment against the class precludes their pursuit of further individual actions on the same cause of action.

#### **IV. THE COMMENTS OF THE DISTRICT COURT CONCERNING THE PETITIONERS' INDIVIDUAL ACTIONS DO NOT ALTER THE PRINCIPLES OF *RES JUDICATA* OR RULE 23.**

Petitioners make much of the district court's comments at the conclusion of the trial to the effect "that it saw no reason why the plaintiffs could not file their individual suits under § 1981 or why the EEOC could not validate a suit under Title VII by issuing now a right to sue letter." 698 F.2d at 675. As the Fourth

Circuit held, however, those comments could have had no effect on petitioner's substantive rights, for the comments were issued four years after the point when petitioners were required to make their binding election on whether to remain in the class or opt out.

Thus, as noted above, this Court made clear in *American Pipe* that a class member retains the option to opt in or out of a class only until notice is received. Once that point is past, and the class member has decided to remain in the class, the option is extinguished, and the individual is bound by the judgment which the class achieves on the merits in accord with the principles of *res judicata*. Clearly, the subsequent comment of the district court could not serve to resurrect an option which had long since been extinguished by operation of Rule 23.

### CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the decision of the Fourth Circuit below dismissing the petitioners' action should be affirmed.

Respectfully submitted,

ROBERT E. WILLIAMS  
DOUGLAS S. McDOWELL  
STEPHEN C. YOHAY \*  
McGUINNESS & WILLIAMS  
1015 15th Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600

*Attorneys for Amicus Curiae  
Equal Employment  
Advisory Council*

\* Counsel of Record